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SUPREME COURT, U.S.
No. 91

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In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, *Appellant*

v.

PERRY HALSETH

On Appeal from the United States District Court for the Eastern District of Wisconsin

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BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court dismissing the indictment (R. 19-27) has not been reported.

JURISDICTION

The order of the District Court dismissing the indictment was entered April 4, 1951 (R. 27). The United States filed its notice of appeal to this Court on May 2, 1951 (R. 29). Probable jurisdiction was noted by this Court on October 8, 1951 (R. 30). The jurisdiction of this Court to review

on direct appeal the order of the District Court dismissing the indictment where such dismissal is based on the construction of the statute on which the indictment is founded is conferred by the Criminal Appeals Act, 18 U.S.C., Supp. IV, 3731. See also Rule 37(a)(2), F. R. Crim. P. The applicability of the Criminal Appeals Act to a situation where as in this case the indictment is amplified by an agreed statement of facts is established by the decision in *United States* v. *Lem Hoy*, 330 U. S. 724, 725.

QUESTION PRESENTED

Whether the mailing by defendant of a punch board and a circular which solicited the addressee to sell chances on the punch board for specified, illustrated prizes and offered to ship the prizes, together with a gift for the addressee, upon receipt of the aggregate amount of the chances on the punch board, was a mailing concerning a lottery and therefore a violation of Section 213 of the Criminal Code.

STATUTE INVOLVED

Section 213 of the Criminal Code of 1909, 35 Stat. 1129-1130 (18 U.S.C., 1946 ed., 336), provided, in pertinent part, as follows:

> No letter, package, postal card, or circular concerning any lottery, * * * or similar scheme offering prizes dependent in whole or in part upon lot or chance, * * * shall be deposited in or carried by the mails * * *. Whoever shall

knowingly deposit * * * anything to be * * * delivered by mail in violation of * * * this section * * * shall be fined * * * or imprisoned * * *.[1]

STATEMENT

An 8-count indictment was returned against defendant in the United States District Court for the Eastern District of Wisconsin, each count charging that on a specified date he violated Section 213 of the Criminal Code by causing to be mailed to a named person "a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance" (R. 1-3). For the purpose of a motion to dismiss the indictment, the parties stipulated that certain materials offered as exhibits were mailed by defendant, and that such exhibits constituted the matter described in the indictment as circular letters (R. 5). The District Court held that if the indictment had alleged the additional facts contained in the Exhibits attached to the stipulation, it would not have charged an offense

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[1] Section 213 of the Criminal Code was repealed, effective September 1, 1948, by Section 21 of the Act of June 25, 1948, 62 Stat. 683, 862, which codified and enacted into law Title 18 of the United States Code. The mailings alleged in the indictment in this case were made before the repeal. However, Section 21 of the codifying Act provides that any rights or liabilities existing under the repealed sections shall not be affected by the repeal.

Provisions substantially similar to those which appeared in the repealed Section 213 of the Criminal Code now appear in 18 U.S.C., Supp. IV, 1302.

under the statute. The court accordingly granted defendant's motion to dismiss the indictment (R. 27).

Four of the counts were based on material relating to radios and ball point pens (R. 8-12), the other four on material relating to cameras and a telescope (R. 14-18). Since the nature of the mailings was the same except for the merchandise offered, it is sufficient to consider, in the main, as did the District Court (R. 21), only the material relating to radios and pens.

The mailings concerning the radios and pens consisted of the following material:

(1) A sheet of paper (R. 8) bearing the letterhead of the Perry Sales Company on which was printed the following message:

FOR YOU—A NEW, PERSONAL
SUPERHETERODYNE RADIO
AS A GIFT—

You'll get many years of pleasure out of this SUPERHETERODYNE PERSONAL RADIO and here's how easily and quickly you can have one.[2] *The quality features are described on the enclosed folder.*

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[2] In the circular for the camera similar language was followed by the words "PRACTICALLY AS A GIFT" (R. 14). Amounts to be paid by buyers of tickets of course corresponded with the different punch board for the camera, as noted *infra*, p. 6, footnotes 3, 4; p. 7, footnote 5.

It's very simple. Merely show the circular and card to your friends, relatives, neighbors and co-workers. Explain to them how they may obtain one of these QUALITY RADIOS, for as little as 1c and not more than 39c.

The enclosed sales card has a list of names and under each seal is a number. For example —Person selecting No. 1 pays 1c; No. 6 pays 6c; No. 11 pays 11c; No. 21 pays 21c; No. 31 pays 31c; all others pay only 39c. NONE HIGHER! Numbers are not consecutive.

Take ADVANTAGE OF THIS RARE OFFER BY WHICH YOU CAN OWN A NEW SUPERHETERODYNE RADIO.

How to send for your Radio! Fill out the enclosed order form. Immediately upon receipt of the order we will rush to you Two (2) SUPERHETERODYNE RADIOS and THREE higher quality Rolpoint Ball Pens.

EXTRA GIFT FOR YOU! A well made Zipper Carrying Case *for your* Radio will be included if the order is received in 15 days.

When you receive your new SUPERHETERODYNE PERSONAL RADIO, you'll get years of enjoyment out of it, and you'll thank us many times for giving you this unusual opportunity.

Sincerely yours,

PERRY SALES COMPANY.

P.S. Should you be unable to take advantage of this offer, we would appreciate your cooperation in turning the enclosed over to a reliable friend. THANK YOU!

(2) A punch board (R. 9) which featured a picture of the radio referred to in the circular. The board also bore the following printed message:

Lucky name under seal receives a Superheterodyne Trav-ler radio. Choice of 4 colors. No. 1 pays 1c No. 6 pays 6c No. 11 pays 11c No. 21 pays 21c No. 31 pays 31c. All others pay only 39c NONE HIGHER[3]

* * *

3 extra winners Nos. 22, 33, 44, each receives a Rolpoint Ball Pen $5 value[4]

On the face of the board there appeared one larger size semi-perforated circle within which was printed, "Do not remove seal until entire card is sold," and 80 smaller semi-perforated circles in each of which was printed a three-letter common name. On the reverse side of the card were printed the 80 names, each with a line beside it, and below these names, this message (R. 21):

This card contains eighty names. No. 1 pays 1c, No. 6 pays 6c, No. 11 pays 11c, No. 21 pays

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[3] In the punch board for the camera the prices ranged from 1¢ to 24¢ (R. 15).

[4] In the punch board for the camera No. 19 receives a telescope (R. 15).

21c, No. 31 pays 31c, all others pay only 39c. NONE HIGHER. This card is given to you absolutely free. You can use as sales card if you wish. It can be used with any merchandise. Prospective purchaser is not obliged to pay unless he desires to do so. IF YOU DESIRE TO PURCHASE MERCHANDISE FROM US YOU CAN DO SO AT ANY TIME.

Total $29.95 [5]

POSTMASTER: This parcel may be opened for postal inspection if necessary.

(3) A circular extolling the radio (R. 12),

(4) An order blank as follows (R. 10):

Use This Order Blank

PERRY SALES COMPANY
417 S. Jefferson St., Chicago 7, Ill.

PLEASE SHIP AT ONCE TO
Name
Address Zone
City State

---

[5] For the punch board concerning the camera there were only 24 punches (R. 15) and the total amount was $4.99 (R. 16).

2 TRAV-LER RADIOS

[] Ivory and Blue [] Ivory and Red
[] All Ivory [] All Walnut
and THREE Rolpoint Ball Pens
Remittance enclosed
[] $29.95 Payment in Full
[] $2.00 Deposit, Balance C.O.D.
[] Ship C.O.D. for Full Amount

EXTRA GIFT

If you send your order in 15 days, you receive a SMART ZIPPER CARRYING CASE [Picture of carrying case]

Mark X here [] if you are to receive carrying case.

NOTICE—If you enclose cashier's check or money order in full, you save paying C.O.D. fees and we repay all shipping charges.

(5) A printed return address envelope (R. 11).

The District Court held that under Section 213 of the Criminal Code mailings "concerning any lottery" must relate to a lottery which is already in existence, and held that, under the facts as stipulated, there would be no lottery unless the person receiving the material mailed by defendant put the punch cards to use. The court further held that defendant's belief that the punch cards would be used did not bring the lottery into existence at

the time the material was mailed (R. 22-25). The court referred to the prior failure of the Post Office Department to apply the statute to similar mailings, and to efforts of the Department to have the statute amended, as further indication that the statute was not designed to reach material of the type involved in this case (R. 25-26).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that the mailing of a punch board and circular carrying an illustration of merchandise to be won as prizes and a description of how such merchandise could be obtained through use of the punch board to sell chances, did not constitute mailings "concerning any lottery" within the intendment of Section 213 of the Criminal Code, supra, pp. 2-3.

2. In holding that, under the scheme for selling merchandise through use of the punch boards to sell chances, no lottery came into existence until the person to whom the punch board was mailed put it to use.

3. In granting the motion to dismiss the indictment.

SUMMARY OF ARGUMENT

I

A. Defendant had an established lottery when he mailed the circular. Prizes depending on chance were specified and offered in the circular.

and were illustrated on the punch board which accompanied it. Tickets to be sold for compensation had been fully prepared and placed on the punch board ready for sale and drawing. Defendant agreed in the circular to deliver the prizes in return for a sum exactly equal to the amounts to be paid by the purchasers for the tickets. His scheme had all of the elements of a lottery (*Horner* v. *United States*, 147 U. S. 449), and all that was needed was a mailing designed to bring the opportunity to the public.

B. Defendant's contention that his circular contained a mere offer to the addressee to purchase his merchandise, and thus did not involve a lottery; is without merit. His circular plainly intended a solicitation to the addressee to sell tickets on the lottery which had already been established. The offer contained in defendant's circular is to be distinguished from the so-called package deals wherein a retailer buys outright and takes immediate delivery of candy, etc., together with punch boards, and then later seeks to raffle off the merchandise without any further responsibility on the part of the seller. Here, the offer was not made to persons who were in business as retailers but to private individuals who were importuned to contact their friends, relatives, neighbors, and co-workers. And the defendant plainly assumed the responsibility of making good the prizes and "gift" after the exact amount of money received from the sale of the punch board tickets had been remitted to him.

As compensation for selling the tickets the addressee of the circular was offered a "gift" which was substantially equal to the value of the prize to be given to the winner of the lottery, a proposition inconsistent with an outright sale. Furthermore, the mailings embodied no reasonable warning that the addressee was deemed to be a buyer of the prizes and his own "gift," or that he was to take full responsibility for making good the prizes after the drawings from the punch board had been completed. Nor was there anything in the mailings to indicate that title to the prizes would ever pass to the addressee as distinguished from the winner of the lottery.

In the circumstances of this case, it is clear that the defendant's relation to the lottery carried through the sale of the tickets and the delivery of the prizes. Consequently, the defendant's circular was a solicitation to the addressee to sell the punch board tickets, and was not merely an outright offer to sell the merchandise offered as prizes and gifts.

II

A solicitation to an addressee to sell tickets for a lottery is within the prohibition of the statute. It is not defensible on the hypothesis that the solicitation might not be successful. A circular offering tickets directly to purchasers might equally be unavailing and the lottery might never be completed, but the circular would nevertheless consti-

tute a violation of the statute. The history of this legislation discloses that it is, by reason of its purpose and its use of the very broad and inclusive word "concerning," a prohibition of the widest scope. Any implied exception would necessarily have to rest upon complete lack of intent and effect to further a lottery. Decisions relied upon by the defendant for their language to the effect that a lottery must be in existence when the prohibited action takes place are inapposite; the language used in those cases involved different statutes containing narrower provisions which indicated that they were to be inapplicable to lotteries which had already been completed. Thus, *France* v. *United States*, 164 U. S. 676, and *United States* v. *Irvine*, 156 Fed. 376 (D. Ore.), are not controlling here.

III

The judge below placed some reliance upon certain efforts of the Post Office Department to obtain an amendment of the statute, more than 19 years ago. He also referred to certain omissions of the Department with respect to the enforcement of the statute. But the early efforts to obtain an amendment to facilitate enforcement did not have reference to an integrated scheme such as the defendant has evolved, nor did it assume that such a scheme would be legal. The efforts, rather, were directed toward facilitating actions in the case of outright sales of lottery paraphernalia where no

connection was retained by the seller. In January 1948, prior to the date of the mailings here involved, the Department issued instructions clearly condemning as illegal the mailing of a punch board and sale of prizes if funds for the purchase of the prizes were to be raised by use of the punch board. This would, *a fortiori*, show the position of the Department in the present case where not even the element of a purchase by the addressee was contemplated.

IV

While the present case does not pose the question whether the statute applies to a solicitation to act as independent operator of a lottery or to purchase lottery paraphernalia, we submit that the case may be decided on the broader ground that such a solicitation is prohibited equally with a solicitation, as here, to become a mere ticket seller. The prohibition of all mailings "concerning" a lottery, in sharp contrast with the narrower language of other statutes, is extremely inclusive both in its intent and effect. While a mailing in the case of a completed lottery may or may not be one "concerning any lottery," a mailing concerning a lottery yet to be established is clearly within the letter and purposes of the statute.

ARGUMENT

I

Defendant's Punch Board and Circular Providing for and Offering Prizes of Merchandise to Be Won By Chance Constituted an Established Lottery, and the Circular Which Solicited the Addressee to Sell the Lottery Tickets Neither Contemplated Nor Effected a Solicitation for the Mere Purchase of Merchandise.

A. There is no dispute as to defendant's acts prior to the mailings here involved. With respect to each mailing he had established prizes, which were clearly specified in the circular and on the punch board accompanying the circular. He had provided the tickets and so placed them in the punch board that a purchaser of a ticket would or would not win one of the prizes, depending upon chance. He had agreed to deliver the prizes upon receipt of a sum exactly equal to the aggregate of the amounts to be paid by the purchasers of the chances (*supra*, pp. 3-8). These are all of the elements necessary to the existence of a lottery. *Horner* v. *United States*, 147 U. S. 449, 458-459. It is beyond controversy, therefore, that defendant's punch board, supplemented by the circular and other matter mailed with it, constituted an established lottery, which needed only a mailing designed to bring the opportunity to the public.

B. Defendant contended (Statement in Opp., p. 5) that the mailing merely solicited a purchase of merchandise by the addressee, the while affording the addressee a means of independently raffling off chances on part of the merchandise. But neither

the specific language nor the general purport of the material mailed, contemplated a purchase by the addressee; instead, it was plainly a solicitation that the addressee act as a seller of tickets for defendant's lottery of merchandise. Thus, it was a mailing to further the operation of a lottery established by defendant.

It is apparent at the outset that defendant's circulars were not intended for retailers or other persons whose business it is to buy and sell merchandise. The case is not, therefore, at all comparable to the so-called package deals sometimes offered retailers in which the addressee first buys the merchandise, *e.g.*, candy, together with the punch boards, and then himself seeks to raffle off the merchandise.[6] Here, the addressee was directed to "show the circular and card to your friends, relatives, neighbors, and co-workers" (*supra*, p. 5). To any ordinary addressee it would appear that what was offered to him, even urged upon him, was an "unusual opportunity" to sell chances on a radio and thereby be rewarded with a radio for himself. Had

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[6] For examples, see decisions in which such package deals were banned by the Federal Trade Commission as a violation under 15 U.S.C. 45. *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. 2d 718 (C.A. 9); *Bunte Bros.* v. *Federal Trade Commission*, 104 F. 2d 996 (C.A. 7); *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999 (C.A. 7); *Ostler* v. *Federal Trade Commission*, 106 F. 2d 962 (C.A. 10); *Hill* v. *Federal Trade Commission*, 124 F. 2d 104 (C.A. 5); *Loughran* v. *Federal Trade Commission*, 143 F. 2d 431 (C.A. 8).

a prior purchase been contemplated here, it would not have been necessary for the mailing to urge the addressee to "show the circular * * *" (*supra*, p. 5), for the merchandise would already have been in the addressee's hands, and available for display. It can scarcely be denied that the punch board, coupled with the ticket seller's possession of the merchandise, would be a far better lure for the selling of chances.

Nor is the reasonable intent or effect of the mailing in accord with defendant's theory that the addressee establishes a lottery for which he becomes personally responsible and then buys merchandise from defendant to discharge the personal obligation. In the first place, the punch board bears a definite undertaking of what will be delivered to the winners. The ordinary addressee, not being a merchandiser, would not be in a position to guarantee such delivery and would not knowingly undertake a personal commitment to deliver a specific radio or camera upon the mere offer of defendant to sell him the merchandise afterward. Nor would the ordinary purchaser of even these small tickets on a radio or camera assume that he was relying on the addressee except as salesman for a company able to make the prize available upon completion of the lottery. Defendant was apparently well aware that if an addressee were given any understanding or indication that he was being solicited to undertake a personal responsibility of the type now described by defendant, his readiness

to accept would be diminished if not completely eliminated. But if, as here, an individual were asked only to be a salesman for a raffle conducted by an apparently responsible company, he would, in addition to other inducements, be likely to believe that the lottery was legal and that the whole transaction had the sanction of admissibility to the mails.[7] These are cogent reasons why defendant did not frankly establish the relationship of buyer and seller, but chose, instead, to solicit the addressee to function as salesman of tickets.

The circular employed language designed to give an ordinary reader the understanding that he was undertaking only the limited function and responsibility of a seller of chances, and we submit that a different relationship cannot now be properly urged upon the basis of a few equivocal words. De-

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[7] The importance of this aspect of implied sanction by use of the United States mails was apparent even in the more limited schemes of twenty years ago in which the instigator generally retained less of an interest in the transaction than is true in defendant's scheme. Thus, in the same hearing of the Subcommittee relied upon by defendant and the judge below (R. 25-26), the chief of police of Kansas City, Mo., wrote: "There is continually something new being put out in the way of devices that shall be 'within the law,' or at least advertised so as to give that impression to the prospective purchaser or operator. This office has many inquiries from prospective buyers of such devices as to whether they will be permitted to put them out without being molested by the police. Invariably the device advertised is some sort of a game of chance." Hearing, Subcommittee of Senate Committee on Post Offices and Post Roads, 72d Cong., 1st sess., on S. 182, April 21, 1932, p. 3.

fendant strongly emphasized that the radio to be retained by the addressee was to be a "gift."[8] Although the word "gift" is sometimes used to indicate a small premium given with a true purchase, it scarcely can indicate a mere premium where as here the "gift" is of a value as great as, or greater than, that of the article allegedly purchased. In the context in which the defendant used it, the word "gift" was likely to be understood as a euphemism for the reward or payment for a service. The "gift" offer was, of course, wholly inconsistent with a transaction contemplating actual purchase of two radios.

Similarly incompatible with any actual purchase of two radios is the reference to only one radio where the circular refers to acquisition of ownership by the addressee, as in the word "your" in the phrase "How to send for your Radio!" (*supra*, p. 5). Reference is made to two radios and the three pens only in a phrase devoid of any hint that the addressee is buying them ("[W]e will rush to you Two (2) * * * RADIOS and THREE * * * Pens." *supra*, p. 5), or in the order form which speaks only in terms of shipment and contains no language indicating transfer of title to anything other than the gift merchandise (*supra*,

[8] Only in the circular concerning the camera lottery did defendant employ the more qualified phrase "practically as a gift," sometimes found in other circularizations of this type, and in that circular it was employed only once and not in the heading (R. 14).

pp. 7-8). By means of such language and phrasing any ordinary addressee would be led to interpret the offer as a solicitation to sell the chances on behalf of defendant, the addressee to be recompensed with one radio and to have no relationship to the remainder of the merchandise other than to make delivery thereof to the winners.[9]

There was no such implausibility in the transaction as would warn an ordinary addressee that the offer, conveyed in apt language, was anything but what it seemed to be, *i.e.*, a plain solicitation to sell chances on a raffle. A large merchandiser could safely appoint an addressee as a salesman, for there would be little risk of possible liability on the part of the defendant if any addressee absconded with cash or merchandise. The addressee would ordinarily be dealing with his own circle of friends and would scarcely imperil his status for

[9] This understanding would not be dissipated by the meaningless language on the back of the punch board: "This card is given to you absolutely free. You can use as sales card if you wish. It can be used with any merchandise" (*supra*, p. 7). Obviously the punch board could not be used for "any merchandise" since it was practically covered with pictures of the prizes specified by defendant, and to use it for other merchandise would entail such striking out of pictures and language or such pasting over as would make that use impractical, since it would be suspect with most buyers of chances. Similarly, the ordinary reader, seeing the words, "If you desire to purchase merchandise from us you can do so at any time" (*supra*, p. 7) would scarcely relate this invitation to the punch board transaction, for the literature of that transaction does not otherwise use the word "purchase" in the entirety of the mailing.

so small an amount. Moreover, the amount paid by any one buyer of a chance would normally be too small to result in legal proceedings, especially with the buyer confronted by the normal obstacles of distance and expense and the possible defense of illegality in the entire transaction.

In the leading case of *Horner* v. *United States*, 147 U. S. 449, 463, this Court referred with approval to the early decison in *Commonwealth* v. *Sheriff*, 10 Phila. Rep. 203, for its statement that a lottery would be recognized as such "no matter how ingeniously the object of it might be concealed." The same may be said of a solicitation to sell tickets for a lottery. In the case cited by this Court, the accused had posted signs about his establishment reading "No Lottery." The signs were held to accentuate rather than to negate the real purpose and effect. The same is true of the strange circumlocutions, omissions, and evasions now relied upon by defendant to transform his solicitation into a simple sale of merchandise. It is beyond cavil that defendant's relation to the transaction was intended to carry through the sale of the lottery tickets, for he did not contemplate delivering his merchandise or receiving his money until the chances had been sold by his agent, and the amount he was to receive was the exact amount which the sale of the tickets would produce. Thus, at the time of the mailing, defendant's actual intent was coextensive with the operation of the lottery.

We submit that a proper analysis of the mailings here involved leads unequivocally to the conclusion that they constituted a solicitation to the addressee to become defendant's agent for the purpose of selling tickets on a fully established lottery, and not a simple offer to sell merchandise.

II

A Mailing Which Solicits the Addressee to Sell Tickets on a Lottery Is a Mailing Concerning a Lottery.

The enactment here involved prohibits mailings "concerning" a lottery. This language comprehends an extremely broad coverage by reason of the intrinsic meaning of the word "concerning." The word "concerning" is defined as "pertaining to; regarding; having relation to; respecting; as regards." Merriam-Webster, New International Dictionary (1951 ed.). The word is to be contrasted with the limited coverage of other enactments in this field, such as that relating to transportation into the United States or in interstate commerce, which brings only a lottery ticket or "advertisement of, or list of the prizes drawn" within the prohibition.[10]

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[10] 18 U.S.C., Supp. IV, 1961:

"Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme;

This same broad coverage has, in substance, characterized the legislation since its first appearance in 1868.[11] We find nothing in the legislative history to raise the slightest question as to the intent to prohibit a solicitation to sell tickets. The early decisions of the lower Federal courts which considered the scope of the word "concerning" as used in the legislation recognized an extremely broad coverage. *United States* v. *Noelke*, 1 Fed. 426 (C.C. S.D. N.Y. 1880); *United States* v. *Zeisler*, 30 Fed. 499 (C.C. N.D. Ill. 1887); *United States* v. *Fulkerson*, 74 Fed. 631 (S.D. Cal. 1896). There was discussion of a probable exception, as for example, if a father were to write to his son warning him against a lottery. Such a letter would be literally "concerning" a lottery but would manifestly be outside the purposes of the Act. *United States* v. *Mason*, 22 Fed. 707 (C.C. E.D. Va. 1884). The very mention of the exception, however, points out the broad coverage given the word "concerning." We submit that a mailing literally concerning a lottery can be deemed with-

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or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both."

[11] The Act of July 27, 1868, Sec. 13 (15 Stat. 194, 196) provided "That it shall not be lawful to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever."

out the scope of the statute only if it is clear that the mailing does not or will not propagate or further a lottery.[12] The present case does not pose a borderline situation, for the only ground urged here for an exception from the broad coverage is that the lottery, already initiated, had not reached the stage where salespersons had been designated to sell tickets. Plainly, with the mailing of the circular here involved the defendant's scheme was no longer a mere plan lying dormant in defendant's desk drawer. A mailing which solicits persons to sell lottery tickets is manifestly in furtherance of the lottery, and we believe that conclusion is implicit in the necessary effect of the decisions.

In *Horner* v. *United States,* 147 U. S. 449, this Court, after expressly sustaining the wide coverage of the legislation with respect to the type of lotteries within its purview, impliedly gave its approval to the broad scope of the language "concerning a lottery" which had been indicated in

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[12] This criterion seemed to be the true foundation, as well, for early decisions requiring that the mailing be that of the propagator of the lottery, rather than that of the victim. *Commerford* v. *Thompson,* 1 Fed. 417 (C.C.D. Ky.); *United States* v. *Mason,* 22 Fed. 707 (C.C.E.D. Va.). Of course, it might have been held, we think with better reason, that the use of the mails by the victims was also such a furtherance of lotteries as would bring it within the statute, but the Congress promptly eliminated the necessity for a test of the matter by specifically banning the sending of payment for purchase of a ticket through the mails. Act of Sept. 19, 1890, c. 908, 26 Stat. 465. The same enactment eliminated questions as to whether the tickets could be called a letter or circular.

United States v. *Zeisler, supra.* In the *Horner* case the circular stated the results of a drawing of redemption numbers for certain Austrian bonds and announced the date of the next drawing. Among other questions certified to this Court was the specific question whether the circular was one concerning a lottery (p. 455), and the question was answered in the affirmative (p. 467). While no attempt was made in that case to claim that a circular soliciting the addressee to sell bonds would be on a different basis from a solicitation made directly to a buyer of the bonds, this Court quoted language from the *Zeisler* case which treated both solicitations alike (147 U. S. 449, 460): " 'The circular sent through the mail was intended to induce persons to purchase *and deal in these bonds* with the hope of becoming the lucky winners * * *' " (italics supplied). There is thus no basis to assume that a solicitation is innocuous unless it asks the addressee to buy a ticket; the propagation of gambling is advanced as much if not more by obtaining a seller or dealer for the tickets.

There is obviously no ground for the contention that a solicitation to sell tickets is any the less a circular concerning a lottery because the addressee may decide not to heed the solicitation. The same possibility exists in the case of a solicitation to buy tickets, yet it could scarcely be contended that a circular offering lottery tickets would not be one

"concerning" a lottery merely because the scheme might fail for lack of buyers.

The cases cited by defendant and the court below (Statement in Opp., pp. 2, 3; R. 22-23) for their language to the effect that the lottery must be in existence at the time of the alleged violation are not apposite. In *France* v. *United States*, 164 U. S. 676,[13] the drawing involved had been completed when the interstate transportation of "hit-slips" and official result sheets took place, and this Court was called upon to construe the language "ticket, chance, share or interest in or dependent upon the event of a lottery" appearing in the different statute there involved. The Court held that that statute, which did not contain any such language as "concerning any lottery," looked to the future, and that since the drawing had been completed when the transportation took place there had been no violation because the lottery was then no longer in existence. The decision in that case rested entirely on the restrictive language of the particular statute there construed. In *United States* v. *Irvine*, 156 Fed. 376 (D. Ore.), neither the indictment nor the circular involved showed the existence of a lottery, and the court merely held that where the circular mailed does not show the

[13] When this case was cited by the Post Office Department (see R. 25), the Department was not speaking of such a case as that presented here. See *infra*, pp. 29-31.

existence of a lottery, such existence must be alleged in the indictment.[14]

In neither of the above-cited cases was it held or intimated that a lottery is not in existence *before* the first ticket is sold. In fact, in the *Irvine* case, the court relied on language quoted from another case indicating that the requirements of the statute would be met by an indictment charging an "*intention to hold some lottery* or drawing for prizes, to which the circulars must relate" (italics supplied; R. 23). We submit that a solicitation by the instigator of a lottery designed to induce another person to become his agent in selling the lottery tickets, which have already been prepared and which accompany the solicitation, implies the existence of a lottery. Such action by the instigator necessarily reflects full knowledge and understanding on his part that a lottery has been launched. Manifestly, then, the existence of a lottery is as implicit in the soliciting of an agent to sell fully prepared lottery tickets as it is in an offer to sell those tickets directly to a prospective purchaser. It is no answer to say that the addressee of the agency proposal may not accept, for a solicited purchaser may likewise decline to buy. It is but ingenious to

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[14] In *Francis* v. *United States*, 188 U. S. 375, also cited by defendant, the question of the existence of the lottery was not considered. There, this Court merely held that a duplicate of the purchaser's slip, which had been retained by the agent, did not purport, within the purview of the pertinent statute, to "represent" the purchaser's interest in a lottery.

argue that the existence of a lottery depends solely upon the action and intent of an agent, and not upon the purpose and manipulations of the person who has conceived and brought into being the reprehensible scheme. The purpose of the statute here involved would be largely defeated if every instigator of a lottery might with impunity mail any number of circulars and tickets so long as the mailings would take place in advance of the time set for the sale of the tickets.

In *Boasberg* v. *United States*, 60 F. 2d 185 (C.A. 5), the court upheld a conviction in a situation where the drawings were not to commence until a time in the future. There the circular apparently contemplated that the lottery would be physically conducted by the sender of the circular and not through distant agents. The court below in attempting to avoid the Government's argument that the lottery need not be in present operation in order to bring the circular within the statute, pointed out that the *Boasberg* opinion did not discuss the question. The court then sought to distinguish the *Boasberg* case from the case at bar on the fact that Boasberg intended "to personally operate" the scheme, while in the case at bar, the defendant "could at best only hope that the punch boards would be used as he desired" (R. 23-24). The purported distinction suggested by the court below ignores the undeniable fact that the offer of the prizes here was fully outstanding in the circular mailed, and was accompanied by the tickets or

chances which had previously been prepared and made ready for disposal to purchasers. To subject the statute to an exception simply because all of the details of furthering the lottery are not intended to be "personally" carried on by the instigator, or because such details have not been completed, would reduce the operating ambit of the statute to such a narrow area as to render it largely ineffective to carry out the Congressional purpose. Few instigators of lotteries would be lacking in ability to show that events outside of their "personal" control might defer or prevent the completion of the lottery. The "personal" factor indicated by the court below is novel to the statute, and is plainly inconsistent with its broad purpose, *i.e.*, that the United States mails shall not be employed as a means to further or to conduct any form of lottery.[15]

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[15] The considerable reliance placed below (R. 24-25) upon *Stockton* v. *United States*, 205 Fed. 462 (C.A. 7), is, we submit, even less justified. That case actually turned upon the particular legislative history of the different statute there involved (now 18 U.S.C., Supp. IV, 1341), which prohibited a mailing "for the purpose of executing" a scheme to defraud devised by the accused. The accused had issued a catalogue advertising marked cards and loaded dice, on an outright sale basis and without contemplation of further participation either in furnishing the prizes, or otherwise. The court relied *inter alia* upon the fact that the statute had, at an earlier time, been amended specifically to prohibit the sale of certain specified articles susceptible of fraudulent use, e.g., counterfeit money; therefore, sales of articles not thus specified were apparently not to be held *per se* the devising of a scheme to defraud and the "executing" thereof by mailing (p. 468).

III

The Earlier Requests of the Post Office Department for More Readily Enforceable Legislation Do Not Constitute an Administrative Sanction of Mailings of the Type Here Involved Nor Can Such Sanction Be Derived From the Department's Past Enforcement History

The court below relied in part upon the fact that the Post Office Department had for a time made efforts to obtain more readily enforceable legislation, and assumed that such proposed legislation indicated an interpretation of the Department that the present legislation was inapplicable to "such mailing as that now in question" (R. 25). We submit that such an assumption is unwarranted. The Department, for a period of time, more than 19 years ago, sought legislation barring from the mails "any article, device, or thing designed or intended for the conduct of a lottery, gift enterprise or scheme" or any communication concerning it, but the doubts as to whether the then existing statute applied to punch boards seem to have been limited to the case of the punch board manufacturer whose participation went no farther and lasted no longer than the outright sale of the punch boards or, at most, to the outright and completed sale of the boards and prizes.[16] We find no refer-

[16] Thus, Senator Ramseyer, a Subcommittee Chairman, stated, in 1921: "[I]n order better to enforce the law against the lottery enterprises it is proposed to bring in the persons, companies, and corporations that are engaged in manufacturing these schemes, like punch boards, raffle boards, and other things along that line * * *". 61 Cong. Rec. 6283. And see 61 Cong. Rec. 6284, 6285, 6288.

ence whatsoever to such extensive participation as is involved where the accused offers the use of a punch board and receives payment for the prizes only after funds have been obtained through the operation of that punch board. We find no instance where reference was made by the Post Office Department to any circular or order form, such as those involved here, plainly indicating a continuing interest of the seller after the punch board has been received by the addressee. Punch boards were exhibited as examples, but not sets of circulars as in the integrated scheme here involved.

Indeed, there are clear indications that no doubt was entertained as to the application of the existing statute where the person claiming to be only a seller had any connection beyond mere sale. The Solicitor of the Post Office Department in a 1928 opinion to the effect that punch boards were mailable added the specific *caveat,* "when offered for mailing by manufacturers *if they are not connected with the use made of the boards by the retailer*" (italics supplied). 7 Op. Solicitor Post Office Dept. 655, 656. And in testimony before a Senate Subcommittee in 1926, Horace J. Donnelly, the then Solicitor, stated: "If the merchandise was sent separately I would say it would not be included in the present or proposed statute * * * *unless there was sent along with the merchandise such matter as would show clearly that it was intended for the conduct of lotteries*" (italics supplied).

Hearings, Subcommittee of the House Committee on Post Offices and Post Roads on H. R. 6982, 69th Cong., 1st sess., p. 7, February 18, 1926.[17]

The efforts of the Post Office Department in the years preceding 1932 to have the statute amended were directed primarily to cases where the manufacturer sold paraphernalia without a retention of interest or connection after the sale. The program of the Department indicated no interpretation that the then existing statute would be considered inapplicable, even in the case of an outright sale, where payment was to be made for the paraphernalia from the proceeds of the sale of chances on the punch board.

Defendant can derive little support from the alleged lack of enforcement for the construction placed on the statute by the court below. We are not advised as to the magnitude of the mailings in

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[17] Where doubts were raised, in hearings, as to the application of the existing statute in the cases of combined sales of punch boards and prizes, there seemed to be contemplated a simultaneous transaction involving shipment of punch board and prizes. No suggestion was raised concerning a purchase of prizes after the proceeds of the punch board had been obtained. The phrases employed in the hearings indicate a simultaneous shipment, *e.g.*, "These cards or boards have attached thereto concealed numbers or names, some of which * * * entitle * * * to certain prizes *displayed with the card or board.* [Italics supplied.] (Hearing, Senate Committee on Post Offices and Post Roads on S. 2751, 70th Cong., 1st sess., p. 2, March 27, 1928); "a complete lottery device, the board and the articles to be awarded by means of the drawing" (*op. cit.*, p. 4).

the years prior to 1932, which contained solicitations to sell lottery tickets as distinguished from direct solicitation to buy such tickets, and it is not clear that the practice was so persistent as to call for an unyielding program of enforcement. However, defendant himself cites the unreported case of *United States* v. *Bundy and Gordon*, No. 10098, decided October 4, 1938 (S.D. Ala.) involving an effort of the Post Office Department to enforce the statute in a punch board case as long ago as that year (Statement in Opp., pp. 3-4), and refers pointedly to the failure of the Government to appeal from the adverse decision of the District Court in that case. The failure of the Government to appeal a given case may, of course, rest on any number of factual and procedural factors entirely apart from questions concerning the construction of the pertinent statute.[18] Thus, the lack of reported cases showing persistent efforts to enforce a penal statute in the type of case presented is not, without more, indicative of a contrary interpretation; nor is the failure to appeal from an adverse unreported decision an acquiescence in the construction implicit in the decision, or the abandonment of a contrary view of the statute.

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[18] For example, in the *Bundy and Gordon* case, the District Court stated no grounds for its action in sustaining the demurrer to the indictment, and a serious question of appealability under the Criminal Appeals Act would have been presented had an appeal been taken.

In any event, defendant was not entitled to act upon the basis of the administrative interpretation he now ascribes to the Post Office Department, for the Department had clearly announced its stand before the mailings here in question. In January, 1948, it was clearly stated that a person is deemed to be conducting a lottery where he "is sending through the mails punch boards to be used by addressees for the purpose of conducting a lottery, as a way of raising funds to purchase the lottery prize from the sender."[19]

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[19] "INSTRUCTION OF THE SOLICITOR—LOTTERIES, GIFT ENTERPRISES, OR SCHEMES FOR THE DISTRIBUTION OF MONEY OR PROPERTY BY LOT, CHANCE, OR DRAWING

"All personnel of the Post Office Department and the public should carefully note the following with regard to the present policy of the Office of the Solicitor in making recommendations under section 259 of title 39, United States Code (sec. 604, P. L. & R., 1940).

"The above-mentioned section of the United States Code specifies that the Postmaster General may upon evidence satisfactory to him that any person or company is engaged in conducting 'any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property, by lot, chance, or drawing of any kind,' instruct postmasters at any post office to return to senders all mail received at his office addressed to the person or company conducting such lottery, gift enterprise, or scheme with the word 'Fraudulent' plainly written or stamped on the outside thereof. In the future, when evidence is received showing that a person or company is sending through the mails punch boards to be used by addressees for the purpose of conducting a lottery, as a way of raising funds to purchase the lottery prize from the sender, the above-mentioned statute will be considered to have been violated on the ground that such person or com-

In view of the extensive respects in which the administrative history supports the Government's construction of the enactment, it is unnecessary to

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pany is engaged in conducting a 'scheme for the distribution of money, or of any real or personal property, by lot, chance, or drawing of any kind.'

"'All postmasters are instructed to give due publicity to the above policy concerning punch boards.'' [The Postal Bulletin, Vol. LXIX, No. 19,100, p. 2, January 28, 1948.]

"INSTRUCTION OF THE SOLICITOR—LOTTERIES, GIFT ENTERPRISES, OR SCHEMES FOR THE DISTRIBUTION OF MONEY OR PROPERTY BY LOT, CHANCE, OR DRAWING

"Supplemental Instruction

"Supplementing the information contained in notice which appeared in the Postal Bulletin of January 27, 1948, relative to the mailing of punchboards by parties who offer to furnish prizes to be paid for with funds raised in the sale of chances on the board:

"When mailings are received by a postmaster, he is not to treat them as nonmailable under section 601 or 604, Postal Laws and Regulations, 1940. He should dispatch or deliver the mailings, full responsibility to rest with the senders for any violation of law involved. The postmaster, if located at the office where the matter is originally mailed, should, when possible, secure from the senders a sample of the mailing and forward same to the Solicitor. The latter should also be furnished a statement of the number of pieces offered for mailing at that point.

"It should be pointed out that matter relating to a 'scheme for the distribution of money, or any real or personal property, by lot, chance, or drawing of any kind' is to be marked 'Fraudulent' and returned to senders only after an order is issued by the Postmaster General under section 604 'upon evidence satisfactory to him' that the parties involved are conducting such a scheme." [The Postal Bulletin, Vol. LXIX, No. 19,105, p. 3, February 12, 1948.]

dwell upon the limited force of defendant's argument based on the presumed administrative construction. Even if defendant had been able to establish an interpretation of the Post Office Department relating to such a case as that here posed, neither such an interpretation nor the failure of Congress to amend the statute could be deemed to overcome the extreme breadth of language of this enactment and the plain mandate of its purpose. See *Ex parte Collett*, 337 U. S. 55, 61; *United States* v. *Girouard*, 328 U. S. 61, 69-70; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 52-53.

IV

Even If It Were Assumed Arguendo That Defendant's Circular Actually Constituted an Offer to Sell the Punch Board and Prizes, the Circular Would Be a Circular "Concerning" a Lottery, in Violation of the Statute.

While we think there can be no doubt, as pointed out *supra*, pp. 14-21, that the circular here involved was a solicitation to the addressee to enter into the relationship of a seller of tickets for a fully established lottery of defendant's merchandise, we submit that the case may be properly decided upon the broader construction that the statute prohibits the mailing of a circular offering lottery paraphernalia upon an outright sale basis. And we do not believe that such construction need be conditioned, as it was conditioned in the earlier discussions of representatives of the Post Office Department,

upon the retention of some further connection by the seller. We submit that the application of the law is to be stated, not in terms of whether an interest is retained by the seller, or whether the lottery is in operation or is prospective only, but rather upon the basis of whether the item mailed to which the circular relates is an item so dedicated to the operation of a lottery as to bring the lottery into existence. A punch board, containing only numbers, without more, may truly be a novelty item for use as a mere game at parties. But if it bears on its face a specification of a consideration to be paid for a chance and a specification of prizes to be awarded defendant upon chance, it is a means of conducting a lottery and is therefore in furtherance of one, irrespective of ingenious language shown in small print on the back of the board to the effect that the buyer of a chance can choose not to pay, and irrespective of the patently remote possibility that the board may be used as a game without payment of any consideration.

The basis for the foregoing position is that the language of the statute here involved is unconditioned, and the evil against which it is directed is propagated as truly by the person who takes the early, promotional steps in furtherance of a lottery as by the person who performs an act later in the reprehensible chain, perhaps a mere ministerial act of limited consequence. We find nothing in the legislative history of the statute to indicate that a circular, the purpose of which is to further

the operation of a lottery, is outside the contemplated scope of the broad words "concerning any lottery," especially when the circular is accompanied by the means of conducting the lottery itself. The requirement of present existence of the lottery has been enunciated by this Court only with respect to a basically different enactment and for reasons not applicable here. As pointed out *supra*, p. 25, the decision in *France* v. *United States*, 164 U. S. 676, related to a completed lottery and not to a prospective lottery. Furthermore, the enactment there involved contained no broad prohibition of mailings "concerning" a lottery but applied only to items representing lottery tickets and to advertisements of a lottery. See 164 U. S. 677-678, footnote 1. Reasonably, the designation of "ticket" could not be applied to "hit-slips" or result sheets which merely recorded winning combinations and the sequence of the numbers drawn, and which did not purport to be the purchasers' evidence of rights. A basically different concept is also involved in the statute which covers mailings in execution of fraudulent schemes. There, as pointed out, *supra*, p. 28, footnote 15, the legislative history of the statute has been considered to narrow the coverage. Since mailings concerning specific fraudulent devices were expressly prohibited by an amendment of the statute, it was deemed that the mailing of a catalogue of devices not so expressly

prohibited could not properly be held *per se* a mailing designed to execute a fraudulent scheme.

The narrower scope of the statutes underlying the cases cited by the defendant and the court below but emphasizes the broad purview of the statute here involved, leaving no just doubt that under it the mails of the United States are barred to all mailings which have for their purpose the furtherance or conduct of a lottery. In this instance, Congress has commanded broadly that the United States mails shall have no part in either the promotion or the operation of lotteries or similar schemes offering prizes dependent on chance. Those purposes will be circumvented in large part if the governmental authorities must wait until lotteries are flourishing before they may take action to enforce the statute.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment dismissing the indictment in this case should be reversed.

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